

After Orbán

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The new authoritarian regimes effectively cloak themselves in their constitutional-looking clichés. These not only serve to legitimize dictatorial rule, for a time, but also obscure paths forward to rebuild democracy and the rule of law. Hungary is currently a model state for the relativization of the rule of law, using it as a political tool of obfuscation.

With a view to the 2022 elections, there is a serious contradiction in Hungarian public opinion: For one, there seems to be a consensus that a change of government will not be enough, and that Hungary needs some kind of regime change, the abolition of the NER ("[System of National Cooperation](#)") is the ideological self-designation of the regime, see Kovács & Trencsényi (eds.), *Brave New Hungary. Mapping the "System of National Cooperation"*). For another, there is no consensus on what a small parliamentary majority (not two-thirds!) should do with the Basic Law. There should be a regime change, but the Basic Law should not be touched – this will not work.

Currently, the logic that a parliamentary majority *makes* the constitution with the seats won after the election rules. Even bona fide 'regime changers' identify constitution-making with parliamentary decision-making. Even with a two-thirds majority, it is worth abandoning this logic. The alternative becomes clear if we look at the current context, from which constraints arise: In any case, it is necessary to get rid of the present constitution.

Neverending story?

At the moment, even with the persistence of a democratic opposition coalition, it is doubtful that the Fidesz regime will end as a result of elections. Firstly, because of the disproportionality of the electoral system, the monolithic political composition of the electoral decision-making bodies and the presumed bias of the Curia (High Court of Hungary). Secondly, because the propagandistic mode of the government media system (partly public service media, partly owned by allies) is inherently a serious handicap to non-pro-government arguments and reality. These are only two facets – one could go on and on about what makes the fairness of elections illusory.

For now, let us concentrate on the other type of endlessness! The regime has deliberately set itself up to reduce political elections to an irrelevant moment, so that it need not fear losing power even if it loses the elections. This is the ultimate denial of democracy: total disregard for the will of the electorate. A democratic coalition government of the future, formed with a small majority, will be unable to govern permanently, because the institutions and cadres of the once-governing Fidesz will obstruct most of the essential government decisions and parliamentary laws

by all means. No one can expect consensual logic and political neutrality from an organization that has never exercised autonomy.

Those hoping for democratic governance must reckon with these obstacles. The whole institutional setting of Hungary, from the Constitution to the election of the President of the Curia, was built on the logic of not being able to govern for others. Prime Minister Orbán has molded the public law system in his own image – it cannot be run by anyone else. The regime has never hidden the fact that it was playing a long game. It has calibrated the whole system and all its institutions, from the Constitutional Court, the Media Council, the Hungarian National Bank, the State Audit Office, the National Electoral Commission, the Attorney General to the President of the Curia, precisely for this purpose. All public bodies that would formally act as a constraint on the exercise of executive power in a constitutional state are now the instruments and loyal support of the government. This political role will act as a brake on any attempt at democratic governance after the elections. A new government would soon be plunged into crisis and will unwittingly vindicate the anti-democratic accusation that only the “national side” (Fidesz) is able to govern. From there, there is little turning back. The solution is, of course, not to dismantle the brakes, but to put in place a real system of public law, with brakes that are not political in meaning, to replace an institutional system that has become totally one-party. That is what regime change means.

Broken constitutionalism

The revised Basic Law of 2011 was not only corrupted by the shameful political will of Fidesz to hold on to power, but also by the way it was drafted. The process was nothing like democratic constitution-making; social debate, participation and professional concepts did not cross the editorial mind of former MEP Szájer; the disgraced politician once in charge of drafting. Before the 2010 elections, there was no popular demand or electoral mandate for a new constitution. It was purely a consequence of the two-thirds parliamentary majority. Since, the normative content of the already incoherent, confused, ideologically-driven text has been completely dismantled and reconstructed by repeated ad hoc amendments.

The 2011 Basic Law symbolically broke with the Hungarian republican tradition, which was intertwined with the division of powers and their democratic exercise. The proclamations of the republic (in 1848, 1918, 1946, and most relevantly 1989) were rare democratic moments in Hungary, a victory for progressive and humane forces in the fight against despotism. Their denial destroys the democratic identity of Hungarian society. What is now essentially a one-party constitution creates an exclusionary, false unity based on values that contradict the identity and hopes of a modern European national community. The Basic Law openly breaks with the principle of the neutral state, and ideologically constrains a social community and its institutions, which are plural in many respects.

It is inconceivable that a new government with democratic intentions could or should remain permanently faithful to such a fundamental law. The government would

become discredited, if the Basic Law was not renounced. Likewise, how should it bind judges in a democratic system?

Democratic arguments for a new constitution

In some cases, the year-long pursuit of exclusive power and the theft of public funds raises questions of legal accountability. But whatever the new government and the electorate may think about accountability of those who have committed public political crimes, there will be no chance of progress without a change in the constitution and the public law system. The weight of past injustice will weigh on new democratic governance.

The creation of a new constitution would just be the first of many unravellings. The new government will want to govern, and govern successfully. Therefore, it will be forced to solve, trick, blackmail and reset the machinery of the system at a lower level. This includes the political selection and replacement of staff in the state administration and other shenanigans.

After a lost election, the Fidesz network of political and public institutions, from the press to the constitutional judges, would inevitably claim that every governmental and parliamentary decision to undo Fidesz's rule is a violation of the rule of law and constitutionalism. This not only makes governance and the necessary public law reforms impossible, but also further destroys the culture of constitutionalism and relativizes the acceptance of the rule of law.

The current and many previous Hungarian crises are caused, among other things, by a lack of real participation. Even the breakdown of the Communist regime in 1989 did not alter this, and the involvement of society remained low. Today, this sequence of events is remembered as a closed agreement between the elites. And the unusually long democratic period in Hungarian history (1989-2010), according to its critics, was synonymous with the rule of formal constitutional institutions. The authoritarian populism of the Fidesz government was able to exploit this original flaw after the regime change to the extreme, both to undermine the institutions of liberal constitutionalism (the Constitutional Court, judicial independence, ombudsmen), while removing all the checks and balances built into the government. These have no value in populist regimes and their social acceptability cannot be established by a clear declaration.

If we recognize the reasons that allowed the Republic of 1989 to fail, the reconstruction of democracy cannot be that – a mere reconstruction. A programme that seeks to restore the liberal rule of law with the weak democratic participation of the pre-2010 period is doomed to failure. However disingenuous and exclusionary the governmental appeal to the sovereignty of the national community against the “foreign” (European) critics may have been, simply denying it cannot lead to results. The familiar arguments of constitutional identity and national traditions have sought to legitimize the dismantling of the institutions of the rule of law and human rights. A simple formal institutional recovery now seems insufficient.

The rule of law and the institutions of liberal constitutionalism – in other words, the system of constitutionally limited executive power – can only be reinstated with greater democratic participation. It is therefore necessary to ensure the greatest possible popular participation in the constitution-making process, not because this might make up for the lack of legitimacy resulting from the likely absence of a qualified parliamentary majority, but because this is the only way to stabilize a constitutional democracy. The dismantling of an authoritarian regime requires a “constitutional moment” (Ackerman, *We the People*), which must be revolutionary in its constitutional content and democratic mode. However great the tension between populism and constitutionalism, popular sovereignty is the ultimate source of legitimacy. Populist politicians [twist the meaning](#) of popular sovereignty, making it exclusionary, nationalist, ideologized and aligned with the institutional rule of the parliamentary majority, the total power of government.

This ‘popular’ constitution-making moment must consist of at least three elements. Firstly, the democratic opposition must make the intention and the method of constitution-making part of the electoral programme, to be able to start preparing this process in the absence of a two-thirds majority. Secondly, the text of a new constitution, after proper preparation, must be legitimized by a referendum. Thirdly (this is where we need to step out of our comfort zones), the best form of preparation is to ensure that the constitutional dilemmas, the institutional solutions – the actual process of constitution-making – is as open as possible, with the widest possible participation. The fears that associate participation with ignorance, partiality, prejudice and lack of constitutional culture must be overcome. After proper professional and political preparation, civil society, interest groups and local communities should negotiate the most important regulatory issues of the constitution and build a broad consensus in an appropriately moderated framework. It may not be possible to complete this process in a few months, but it will help democratic governance and the fight against the remnants of the Orbán regime from the very beginning. The painful problem of the absence of the rule of law can be solved by the means of democracy.

